

***United States Court of Appeals  
for the Second Circuit***



**APPENDIX**





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Q Did you attend the closing on February 11, 1971?

A I did.

MR. BIEHL: I have no further questions.

CROSS EXAMINATION

BY MR. GRUTMAN:

Q Did you believe you had a meritorious claim against Mr. Gross after consulting with your counsel in California?

A Yes, I did.

Q Did you press that claim because of your belief in the merits of the claim?

A That was correct.

Q Were you motivated out of vindictiveness against Charles Gross in pressing your claim?

A No. The claim was pressed months after this whole thing took place.

Q Did you ever engage in a conspiracy with Risher, Kayne, Muh, Berkowitz, Persky, or Finley, Kumble to deprive Charles Gross, Mabel Bleich and Jean Donahue of their capital in Newburger Loeb?

A No, I did not.

Q Did you ever engage in a conspiracy with some, any, or all of those aforementioned people to bring base-



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less claims against them to tie them up in litigation to the end of the world and wear them down by economic attrition?

A No.

Q Subsequent to the transfer agreement going through February 11th, 1971, did you participate and give of your time in attending some of these arbitration sessions which were held in New York?

A Subsequent, yes.

Q Did you incur substantial financial expense for the prosecution of those claims in the arbitration after they were transferred to arbitration by the Federal Court in California.

A Yes.

MR. GRUTMAN: I have no further questions.

CROSS EXAMINATION

BY MR. SHAW:

Q Did you continue to press the litigation after you sold your stock in Newburger Loeb Corporation on or about February 11, 1972?

A Yes. If I am not mistaken the first hearing, I think, was either March or April of 1972. The first hearing before the arbitration, that was. That would have been after that date.



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2 Q After February 11, 1972, were you employed  
3 by the corporation?

4 A Yes. I was employed as manager of the  
5 Century City office.

6 Q For how long?

7 A The office was sold in May of 1974.

8 Q You were employed in the office in California  
9 until May of 1974?

10 A That's correct.

11 MR. SHAW: Your Honor, may I inquire of Mr.  
12 Mandel how long he will be so I can gage the presence of  
13 backup witnesses?

14 MR. MANDEL: Less than an hour.

15 CROSS EXAMINATION

16 BY MR. MANDEL:

17 Q Mr. Sloane, Mr. Persky represented you as an  
18 attorney in connection with the transfer agreement; is  
19 that correct?

20 A He did not represent me individually, no, sir.

21 MR. MANDEL: I would like to read into the  
22 record interrogatory 27 and the answer:

23 Question: In executing the transfer agree-  
24 ment, did you personally rely upon the opinion of any  
25 attorney as to the legality thereof? If so, please state



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the name of such attorney and state whether the opinion you relied upon was written or oral and the date thereof.

Answer: Yes. I relied upon Robert Persky of the firm of Finley, Kumble, Underberg, Persky and Roth, and also the fact that there was general agreement among the approximate 15 other attorneys.

THE WITNESS. I said I relied upon his opinion. I did not say he represented me.

MR. MANDEL: I will now read interrogatory 25:

Question: Were you represented by an attorney in connection with negotiations and execution of the transfer agreement? If so, please name each such attorney.

Answer: I was represented by the firm of Finley, Kumble, Underberg, Persky and Roth.

BY MR. MANDEL:

Q Is that correct?

A I was not personally represented. I was represented as a member of the corporation. I never personally paid any bills to the firm.

Q On February 3, 1975, you swore to the answer which I have just read to the question I have just read; is that correct?

A May I see that?



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(Pause.)

Yes, that's correct.

Q When did you first understand that you might have an opportunity to become a stockholder in a corporation to be formed for the purpose of taking over the Newburger Loeb business?

A The circumstances surrounding that were basically as follows: I was in California managing the Century City office in December of 1970. Fred Kayne was on vacation at the time, I believe, in Aruba. I was aware that there were problems existing in New York and various attempts were being made to do something to salvage either the partnership or form a corporation. I had received some time during this period -- Bob Muh was trying to reach Fred and he called me and asked me if I knew where he could be reached. In the course of the conversation I asked Bob what was happening and he told me that briefly the limited partners, I believe it was at that time, had asked Bob and Paul Risher if they would help out in some kind of restructuring of problems, to the best of my recollection. I told him at that time that if anything does go through and there is a deal consummated, and if Fred is a part of that, I would like to be a part of it. I did not know the details of any



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particular deal going through.

Q You place that in December?

A Either late November or December, somewhere in that period.

Q Isn't it a fact that in answer to interrogatories you said your first discussion about being a participant in a group which would acquire all or part of the business of Newburger Loeb & Company was in October of 1970 or November of 1970 and you had that discussion with Fred Kayne?

A Yes. That answer was based on the first complaint that Mr. Kayne had that never came to fruition. I understood your question to mean my participation in the deal that came to fruition, which was not the same deal.

Q But at least as early as October you had some idea that there could be an opportunity for you in connection with a takeover of the corporation?

A No. I would not say I looked at it as an opportunity in the sense you mean it. No.

Q Didn't you recognize that there might be a financial advantage to you, coming out of this proposed corporation?

A No, sir.

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Q In fact, how many shares did you buy?

A 50,000.

Q You paid \$10,000 for them?

A As it turned out.

Q In toto?

A Yes.

Q You sold those shares in February of 1972?

A That's correct.

Q How much did you get for those shares?

A \$2 a share. I sold 25,000 shares.

Q You sold 25,000 shares for 50,000?

A That's correct.

Q The balance of shares you kept?

A That's correct.

Q How did it come about that you kept some of your shares when Fred Kayne sold all of his?

A To the best of my recollection at the time the sale was being negotiated the buyers had X amount of dollars that they were willing to invest, and there were X number of shares available to be sold. The presentation was made, and at the time of the presentation I was given an opportunity to sell 25,000. I was not told I could sell 50.

Q You simultaneously acquired a put with regard



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2 to your remaining 25,000. Is that correct?

3 A Under certain conditions.

4 Q What were those conditions?

5 A To the best of my recollection, if the  
6 office I was managing, the Century City office, was sold  
7 in other than liquidation of the firm, Newburger Loeb  
8 would pay me \$2 a share for my remaining shares.

9 Q You testified on direct about your conversa-  
10 tion with Charles Gross when you called him at the office  
11 of Philip Mandel; is that correct?

12 A Yes, sir.

13 Q That conversation took place on January 15?

14 A That's the date that has been used. I have  
15 no reason to doubt it.

16 Q This was about the middle of January, right?

17 A Yes.

18 Q Are you quite definite and positive in your  
19 own mind about the accuracy of the account of that con-  
20 versation you gave on direct examination?

21 A Yes, I am.

22 Q There is no doubt in your mind?

23 A At the time of the arbitration, when the  
24 question was first posed to me out of the blue, I did  
25 not recollect a phone call. Subsequently, Mr. Gross, in



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his testimony, testified to the phone call, and later in my deposition, I testified to it. After Mr. Gross' testimony, I did a lot of soul-searching because it was a personal attack on me on the kind of phone call I know I do not make. I am convinced I made the phone call, but not that way.

Q        In the arbitration your testimony was simply that you had no recollection of such a phone call.

A        That's correct.

Q        Did you ever correct that testimony in the arbitration?

A        No, to my recollection.

Q        You called Mr. Gross at Mr. Mandel's office immediately after you had a conversation with Mr. Kayne; is that correct?

A        Within a short period of time.

Q        It was a short enough period of time so that you felt you could still catch Gross at Mr. Mendel;s office after the following thing had happened:

Persky, Risher, and Muh went downstairs, called Kayne from the lobby of the building, had a conversation --

MR. SHAW: Objection.

MR. BIEHL: Objection.



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MR. GRUTMAN: Objection.

MR. BIEHL: I think the recitation of all those facts is not necessary to the question.

MR. SHAW: Objection.

THE COURT: Mr. Mandel is endeavoring to get to the speed with which Mr. Sloane called back based on the fact that he called Mr. Mandel's office. I gather that this was with the anticipation that Mr. Gross was still there. He is trying to recite to see whether the witness will acknowledge whether certain things happened with certain speed permitting that assumption to be valid.

Overruled.

You may go ahead.

Q You understood that somebody had left my office and had gone downstairs and made a phone call to Kayne; is that right?

A That's correct.

Q They had had a conversation with Kayne giving him a report of the meeting?

A That's correct.

Q Were you present when Kayne had that conversation?

A No.



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1  
2 Q Kayne called you immediately and said he had  
3 just spoken to Persky; is that right?

4 A We worked in the same office.

5 Q Kayne immediately turned to you and said he  
6 had just spoken to Persky?

7 A I can't say he immediately turned to me. I  
8 don't know how much time elapsed between the phone call  
9 and his coming in to me.

10 Q You still had the idea that Gross would still  
11 be at Mandel's office?

12 A That was the only place I knew I could reach  
13 Mr. Gross. Whether he had left or not left, I had no  
14 way of knowing.

15 Q You had a conversation with Kayne before you  
16 called; is that right?

17 A He told me the facts of Mr. Persky's phone  
18 call.

19 Q He told you that Gross and his lawyer were  
20 jeopardizing the deal?

21 A No. I don't think that's accurate.

22 Q Didn't you call up Gross to plead with him  
23 not to kill the deal?

24 A I called him to plead with him not to let  
25 the deal be killed -- not what you said, not for him to



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2 kill the deal, if that's your words.

3 Q You called him up to plead with him to not  
4 let the deal be killed?

5 A I called him up because I could not under-  
6 stand why he would stand in the way of the deal.

7 Q Did you say you called him up to plead with  
8 him?

9 THE COURT: Yes, he did.

10 Q Did you say anything at all to Mr. Gross  
11 during that conversation about litigation?

12 A . No, I did not.

13 Q The fact of the matter is that according to  
14 your testimony you had already had two conversations or  
15 three conversations with Mr. Massing about suing Charles  
16 Gross in California.

17 A I believe that I testified I didn't know if  
18 I had spoken to the attorney at that time or not. I am  
19 accepting the January 15th date because it has been of-  
20 fered, but in my mind I cannot state for a fact I had  
21 met with Mr. Massing at that time.

22 Q You met with him early in January, right?

23 A Some time early in January, to the best of  
24 my recollection.

25 Q You met with him again early in January,



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right? You met with him twice early in January.

A There would have been some days between the two meetings.

Q A few days between the meetings?

A Yes.

Q You made the decision to sue Gross when?

A When Mr. Kayne returned from vacation and his wife had completed the operation, we sat down and had our first discussion at that time regarding what we thought our situation was.

Q That was early in January?

A Or late in December. I can't pinpoint it.

Q When did you reach the decision to sue Gross in California?

A Our attorneys reached that decision after our meeting with them.

I am sorry. In California as opposed to somewhere else?

Q I am talking about the California litigation. When did you reach the decision with Mr. Kayne and the attorneys to commence such a litigation?

A It would have been some time after the series of meetings with the attorneys.

Q Was that before or after your conversation



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with Mr. Gross when you called him at Mr. Mandel's office?

A I can't pinpoint it as a time.

Q You don't know one way or the other?

A That's correct.

Q You do know, however, that you had met with  
Massing -- is that his name?

A That's correct.

Q At least twice early in January?

A Some time in that general period.

Q Was the decision to sue made in the second  
meeting, the third meeting, or when?

A Not the first meeting. I cannot tell you for  
certain beyond that.

Q The first time you spoke about Massing, about  
the fact that you may have been or that you were fraud-  
ulently induced to become a partner in Newburger Loeb,  
was it April of 1970?

A That's not my testimony. I spoke to him in  
April regarding my personal liability. There was no  
talk at that time about any fraudulent misrepresentation.

Q Do you recall that on the deposition you  
testified that in April or May of 1970 --

Do you have a copy of your deposition?

A Is that the first or the second?



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Q The first session. I ask you to turn to page 31.

A Yes.

Q Do you recall --

A I am sorry. Is this the first or second?

Q January 28, which is the first session.

A Yes.

Q Do you recall there on page 31 of your deposition that you told me that you and Mr. Kayne realized that you had entered into the partnership under terms other than actually existed as far as the financial condition of the partnership the the first knowledge came to you either in April or May of 1970?

A That's correct.

Q Is it fair to say that in the deposition you said you had a conversation with Kayne about this when you were alone in California some time in April or May -- page 33 -- and that you spoke to an attorney at that time?

A Yes.

Q And that the attorney was Bert Massing, right?

A That's correct.

Q On page 34 of your deposition you said --

A I don't think it is proper. I think you are



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leaving out a question that throws the thing out of context.

Q Tell me about that.

A Line 14:

"Question. You were very worried about your potential liabilities?

"Answer. Yes.

"Question. Did you discuss whether you should speak to an attorney?

"Answer. I believe we talked to an attorney."

This was regarding my personal liability, not regarding any representation. This is page 33.

Q You are telling me that you did not discuss with Mr. Massing in April the question of whether you had any rights or defenses or discussed with him in any way the question of your being brought into the firm by misrepresentation?

A To the best of my recollection, yes.

Q You said that you did not remember whether you and Kayne spoke to Massing alone.

A That's correct.

Q You said you did not remember whether you spoke to Massing on the phone or at his office.

A Yes, sir.



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Q Is that still correct?

A That's correct. On some social basis.

Q You say that in context your testimony on deposition, pages 31 through 35, was that you were only talking to him about your potential liability and not about the fact that you had been brought into the firm by false representations; is that what you say?

A Yes.

Q You are completely clear about that?

A That's my recollection.

Q Did you get advice from Mr. Massing?

A No. There was no specific advice given. There was no specific question or enough information given to get any kind of advice.

Q Did you get general advice from Mr. Massing?

A To the best of my recollection, the only advice was everything else being equal there might be some potential liability being a partner in a partnership that was suffering losses. There might be some problems.

Q Did you need Mr. Massing's advice to let you know that as a partner you could be liable for partner's debts?

A That was not a case of my calling up to dis-



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cuss with him my potential liability. That came about in the course of another discussion or meeting or social event. I obviously had some inkling of it or else I would not have mentioned it. I am not an attorney.

Q        Did you tell Massing that you had been lured into partnership with false information?

A        I have no recollection of saying anything like that, no, sir.

Q        Do you remember that in your deposition you invoked the attorney-client privilege?

MR. SHAW: Objection.

MR. GRUTMAN: Objection.

MR. MANDEL: They can't do that. They invoked the attorney-client privilege at the deposition and then there was testimony at the trial about meetings with Massing. The least I can do is call that fact to the Court's attention. Actually, I believe I had the right to strike all of that testimony if I chose to do so.

MR. SHAW: My understanding is that generally no inference is to be drawn whatsoever from the raising of a privilege. That's the reason we have privilege. It would be an incursion into the existence of privilege to make comment upon it. I don't know what the answer is.



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He previously invoked the privilege but is now testifying  
in that area.

THE COURT: Why don't we recess for lunch.

(Luncheon recess.)

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Afternoon Session, 2:00 p.m.

THE COURT: I overrule the question to the objection to the attorney-client privilege.

Mr. Mandel, I do not think it will make any difference in the outcome of this case.

CHARLES S. SLOANE, having been recalled as a witness, and having previously been sworn, testified as follows:

CONTINUED CROSS EXAMINATION

BY MR. MANDEL:

Q On your deposition, did you plead the attorney-client privilege to the contents of your discussion and Mr. Kayne's discussion with Mr. Massing in April of 1970?

A I don't think it has ever been determined that Mr. Kayne was there with me to begin with.

At the deposition, I gave my recollection of the conversation, and then beyond that we did plead privilege, yes, after giving what I thought was an explanation of what took place.

Q Is it your testimony that you gave the conversation in full to the best of your recollection before you pleaded the attorney-client privilege?

A Yes.



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MR. MANDEL: Your Honor, instead of reading it into the record, may we deem page 31, line 10 to page 38 as part of the record? That's the area of the deposition which refers to discussions between Mr. Kayne and the attorney Massing. Mr. Sloane has testified in context he was only consulting Massing at that time about his liability as a partner and not about his rights because of the alleged misrepresentations.

THE COURT: That's agreeable with me.

MR. MANDEL: Page 31, line 10 to page 38 line 11 of volume 1 of Mr. Sloane's deposition. That is the deposition taken January 28, 1974.

MR. SHAW: Shouldn't we get the entire answer on page 38?

THE COURT: Make it line 18.

MR. MANDEL: Yes.

BY MR. MANDEL:

Q Shortly after your discussion on the telephone with Mr. Gross at Mr. Mandel's office, did you authorize Mr. Kayne to speak with Mr. Gross about settling a lawsuit?

A I was at a meeting that took place when it was discussed, yes.

Q When did the meeting with the attorney take



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2 place? Before or after your phone call with Mr. Gross?

3 A To the best of my recollection, this par-  
4 ticular meeting was after the phone call.

5 Q Within a day or two?

6 A I cannot place it in that respect.

7 Q Do you accept --

8 A If January 23rd was the correct date of the  
9 meeting it was between January 15th and January 21st.

10 Q When was your discussion with Kayne about  
11 his going up to try to settle a litigation?

12 A There was a meeting --

13 Q Your discussion.

14 A My discussion between Kayne and myself?  
15 There was no discussion.

16 Q How much did you tell Kayne you were willing  
17 to settle your share of this three million dollar liqui-  
18 dation for?

19 A There was no discussion as to any specific  
20 amount on my part.

21 Q By the way, how did you calculate your  
22 damages at three million dollars in that litigation?

23 MR. SHAW: Objection.

24 THE COURT: Overruled.

25 A After presenting the attorneys with the facts



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of what happened they came up with various categories of damages which they presented to us and I accepted them.

Q        What were those categories?

A        \$50,000, which was the out-of-pocket loss actually incurred. I believe one million dollars on the punitive damages, and I believe a sum also of one million dollars on potential liabilities of the partnership, and the third million was for loss of other opportunities during employment by Newburger Loeb.

Q        You regarded that as a fair and accurate summary of the damages that have been done to you by Mr. Gross' alleged misrepresentation?

A        Yes, based on a conversation with the attorney.

Q        Did you say you had put in \$50,000 into the partnership?

A        What period of time? I paid in more than \$35,000.

THE COURT: The time of the conversation with the lawyers.

THE WITNESS: At that time I made an initial payment of \$25,000 shortly after signing the partnership agreement. There were a series of payments made from two sources: one was an income tax refund, and there was a series of \$2,000 monthly payments made, but I can't



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recall what time those payments began.

Q Did you ever pay the full \$50,000?

A I believe as of this date there is a balance somewhere in the area of \$4,000 due.

Q At least by the time you began the California litigation you had not paid more than \$25,000; is that correct?

A I am not certain if I made any of those \$2,000 payments or not. I am not certain when they began.

Q Were you in Court when I read Mr. Bamberger's deposition as to what happened on February 11th?

A No, I was not.

Q Did you attend the meeting between Mr. Persky, Mr. Bamberger, Mr. Risher, and Mr. Muh concerning the fact that Mr. Burak would not sign an opinion letter saying that the transfer agreement was properly authorized?

A I have no recollection of any such meeting.

Q You were present at the closing on February 11, were you not?

A Yes, I was.

Q You were aware that Mr. Burak refused to sign an opinion letter, were you not?

A There was a statement that because of an illness, whoever the senior partner in the firm was, he



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was not there and Mr. Burak was not in a position to render the opinion.

Q Do you remember Mr. Burak's saying that?

A That's my recollection, yes.

Q There is no doubt in your mind as to the accuracy of that recollection?

A That thought is very strong in my mind.

Q Burak said the only reason he could not give an opinion letter was that somebody was sick and he was too young?

A I didn't say that. I recollect the statement regarding the fact that somebody was not there and that he was not rendering an opinion letter. I'm not saying that's the only reason.

Q Do you remember Mr. Persky saying anything to Mr. Burak?

A No, sir.

Q You don't remember a meeting between Persky, Muh, Risher, and Bamberger?

A Not specifically. I know throughout the whole day there were a series of meetings.

Q Do you remember when Burak announced he would not give an opinion and when that fact came out the closing stopped?



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1  
2 A The closing stopped a number of times during  
3 that negotiations. I can't recall if it stopped at that  
4 time or not. The negotiations stopped, I should say.

5 Q You don't remember whether it stopped because  
6 of Mr. Burak's opinion letter?

7 A I would assume it did. I can't say I remember  
8 that for a fact.

9 Q Do you remember that Persky volunteered to  
10 prepare an opinion instead?

11 A I remember that Persky prepared the opinion.  
12 letter.

13 Q You don't remember that he volunteered to do  
14 it?

15 A No. I can't recall the specific events that  
16 led up to his actually doing it.

17 Q I call your attention to page 86 on your de-  
18 position on February 1, 1974, session two, line 21. I  
19 asked you this question and you gave this answer:

20 "Question. What happened then?

21 "Answer. I am testifying from being there,  
22 my recollection from being there. There was a discussion.  
23 Mr. Persky volunteered to make up whatever the wording,  
24 make up or prepare the transfer letter. There was no  
25 objection."



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Do you remember that now?

A That's my statement, yes.

Q You were aware, were you not, that Gross, Bleich and Donahue were not consenting but objecting to the transfer?

A I was aware they were not consenting.

Q You knew their attorney had made a claim in the transfer agreement that could not validly be done without their signatures?

A I can't say that I knew that for a fact, no, sir.

Q You had no idea about that?

A I can't recollect. I may have or I may not have.

Q That was never discussed with you by Kayne?

A Not to my recollection.

Q By Persky?

A No, sir.

Q By Bamberger?

A Not to my recollection.

Q By Risher or Muh?

A No, sir, not to my recollection.

Q Wasn't it a fact that they were not consenting behind your telephone call on January 15th and behind your

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idea that they might kill the deal?

A I don't think it is fair to say that the fact that they were not consenting was behind my phone call, no, sir.

Q Did you authorize the inception of this litigation here in this Court on the Buckley claim against Buckley, Bleich, and Donahue?

A In the sense that I understand "authorized" to mean, no. I did not authorize the claim.

Q You were a member of the Board of Directors, were you not?

A Yes. At that time.

Q You knew on February 11th that set offs or claims were going to be asserted so that Gross, Bleich, and Donahue would not have to be paid at once, did you not?

MR. SHAW: Objection, your Honor.

THE COURT: Overruled.

A I can't say for a fact I knew that, no.

Q You didn't think about it one way or the other?

A Think about what?

Q About the fact that Gross, Bleich, and Donahue had capital positions and they were not con-



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2 sending to this transfer agreement.

3 MR. SHAW: Objection. We have two questions  
4 in one, and both are very critical questions.

5 THE COURT: Can you feel that with the two  
6 in there?

7 THE WITNESS: I'm not sure which question I  
8 will be answering.

9 THE COURT: Sustained as to form.

10 Q On February 11th you knew that certain limi-  
11 ted partners were signing the transfer agreement, right?

12 A Yes.

13 Q You knew that in signing the transfer agree-  
14 ment they were giving up their right against the partner-  
15 ship and taking paper of the corporation instead, right?

16 A Yes, sir.

17 Q You knew that the corporation was assuming  
18 all of the liability that the partners or the partner-  
19 ship had to Gross, Bleich and Donahue?

20 A Yes. I believe I knew that.

21 Q You knew that Gross, Bleich and Donahue had  
22 not signed any paper giving up any of their rights?

23 A I may or may not have known that. I cannot  
24 say for a fact I did know that.

25 Q You knew that Bleich and Donahue were limited



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2 partners with capital of \$75,000 each, didn't you?

3 A I knew they were limited partners. I cannot  
4 state for a fact I knew the amount of money.

5 Q You knew that Bleich and Donahue had limited  
6 capital of about \$75,000 each, did you not?

7 A I would assume I knew that.

8 Q What was in your mind on February 11th  
9 about what was going to happen to their claim to be paid  
10 that \$75,000 each?

11 A I thought that after the signing, at the  
12 time of the signing, when all the other attorneys agreed  
13 to this negotiation and everybody went along with it,  
14 that discussions would take place and it would be worked  
15 out. I was in California until a day before the meeting,  
16 and I left the day after, and I was not aware on a day-  
17 to-day basis what was going on as far as discussions,  
18 what was happening.

19 Q So neither Risher, Muh, Kayne, Persky, or  
20 Newburger told you they were going to start an action  
21 within a few days on the Buckley claim?

22 A No, sir.

23 Q Nobody told you that?

24 A That's right.

25 Q It came as a complete surprise to you?

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2 A Yes.

3 Q There was never any discussion of that  
4 that you heard about before the action was brought?

5 A Absolutely not.

6 Q But you told Risher, Muh, Persky, and  
7 Bamberger that you had an action under way against  
8 Gross in California. Right?

9 A No, sir. I never said that.

10 Q You never told it to anybody?

11 A I'm sure I told it to somebody.

12 Q Did you tell it to Risher?

13 A I can't specifically remember.

14 Q Did you tell it to Muh?

15 A I may have. I can't recall if I did or I  
16 did not.

17 Q Did you tell it to Persky?

18 A No, sir.

19 Q He was your attorney.

20 A I never considered Persky my personal attorney.

21 MR. MANDEL: I have no further questions.

22 CROSS EXAMINATION

23 BY MR. GRUTMAN:

24 Q Mr. Mandel put a question to you in which  
25 he asked this: do you recall that Mr. Persky volunteered



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to give an opinion letter which the Rosenman firm demurred giving?

Do you remember that?

A Yes.

Q Do you have a recollection of the circumstances of what followed when Mr. Burak refused to give the opinion letter and how it came about that Mr. Persky was the one that prepared it?

A No, sir. Other than just general conversation taking place, I don't know.

Q Do you know what was said by the other 15 sets of attorneys who were present concerning who would supply the opinion letter?

A No.

Q You can't help us on that?

A No.

CROSS EXAMINATION

BY MR. SHAW:

Q I believe you indicated in response to Mr. Mandel's questions that you were initially in contact with an attorney to discuss the issue of your liability and certain leases, correct?

A Are you referring to my discussions with Mr. Massing?

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A 3747

1  
2 Q Yes.

3 A It was not specifically on leases. It was  
4 just a general position as a partner.

5 Q You were concerned about your general  
6 liability?

7 A Yes.

8 Q Did there come a time when you had any  
9 conversations with Mr. Massing with respect to any  
10 liability that you might have on any leases of the  
11 partnership?

12 A Not unless they came up during our dis-  
13 cussion in January regarding the arbitration. Nothing  
14 other than that.

15 Q Were you a member of the partnership at  
16 the time when the lease was executed with respect to  
17 the premises in Century City in Los Angeles?

18 A At the time of the actual signing of the  
19 lease?

20 Q Yes.

21 A I would imagine I was not because I did  
22 not become a partner until February. We started  
23 working on the office long before that. I assume it  
24 was before I was actually a partner.

25 Q Did you assume any liability with respect



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to that lease?

A In what sense "assume"?

Q In the sense of having to pay the rent if the partnership or corporation did not pay it?

A No.

Q Did there come a time when you were sued in relation to any leases of the partnership or the corporation?

A There is some action going on now regarding some of the leases.

Q Is there more than one lawsuit?

A I know of one that I am certain of, but there may be more. A gentleman from New York has been handling it pretty much.

Q Would it be fair to say there is more than one lawsuit in which you are a party and the issue is rent due or claimed to be due upon leases of the partnership?

A I believe there is. When you say by name, I am familiar with one.

Q Is one of those with respect to the premises at 5 Hanover Place?

A Is that -- one of them is Barbro.

Q Barbro Realty?

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A 3749

1  
2 A Yes.

3 Q Is that 5 Hanover Square?

4 A I don't know.

5 Q In that lawsuit is an attempt being made  
6 to obtain a substantial judgement against you individu-  
7 ally?

8 A I don't think I can answer that. I don't  
9 remember how much the suit is for. I have not seen  
10 those papers for some time.

11 Q Who are the other parties to this suit?

12 A I would assume all the people who were  
13 partners at the time I was.

14 Q Is Mr. Gross a party?

15 A I can't answer that.

16 Q Do you know if he is a defendant in that suit?

17 A I don't know.

18 Q To the extent that the corporation paid  
19 the rent at 5 Hanover Square, was that to your advan-  
20 tage?

21 A I would say it was.

22 Q To the extent that the corporation paid any  
23 of the liabilities or sums due by the partnership to  
24 any creditor, was that to your advantage?

25 A I would assume so.



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Q If it was to your advantage, wasn't it also to Mr. Gross' advantage?

A I would assume so, he being in the same category.

REDIRECT EXAMINATION

BY MR. BIEHL:

Q On the date you spoke with Mr. Gross via the long distance phone, did you have any concern as to what might occur if Gross, Bleich or Donahue did not go along with the transfer agreement?

A My concern was that if it started there might be a snowball-type of effect and others might not go along with it. There was concern that that would cause the deal not to go through if other people who had joined in were not going along with it.

MR. BIEHL: Thank you.

THE COURT: You are excused.

(Witness excused.)

MR. SHAW: I would like to call Mr. Kayne as a witness with respect to my counter claim.

MR. MANDEL: I object.

MR. SHAW: Also certain areas where objections were sustained.

MR. MANDEL: I believe that counter claims

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2 to counter claims should be deferred until after they  
3 have rested on defense.

4 MR. SHAW: That will involve keeping Mr.  
5 Kayne here for at least one additional day. I under-  
6 stand that he is a widower with two small children.

7 THE COURT: Who is standing in for Mr.  
8 Silfen?

9 MR. BIEHL: We have no objection.

10 THE COURT: I will permit him to testify.

11 MR. MANDEL: I have a problem. I am not  
12 prepared on the counter claim because I would expect  
13 in the normal course for them to rest, and nobody told  
14 me before the luncheon recess that Kayne was going to  
15 be called.

16 THE COURT: Then I reverse myself.

17 MR. SHAW: I announced on Friday I was  
18 going to do this. I recall telling it to Mr. Mandel  
19 in the men's bathroom. This is a conversation that  
20 you and I specifically had in the men's room. You ob-  
21 jected outside to this. It is not true you have not  
22 been told.

23 MR. GLATZER: I was present when this was  
24 told --

25 THE COURT: That's in the middle of the day.



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MR. SHAW: It was discussed last week too at the end of Mr. Sloane's examination and Mr. Kayne's examination I could not ask questions at that point but at that point I could call them as my witness.

THE COURT: I conclude from what we were saying was that you would have to bring him later in the trial, not that you would call on the same day. He was on the stand this morning. It is almost as if you had taken his testimony when he was here.

MR. SHAW: I concluded what I would have to do was to not permit him to go to California. I cannot spend the money involved in transporting him back from California a day or two from now.

THE COURT: Mr. Silfen objected to your doing this while he was on the stand. That was as recently as this morning. He has hardly gotten off the stand and you want to recall him.

MR. SHAW: Mr. Silfen has no objection to that as long as it is part of my case.

THE COURT: It works a hardship in his cross examination.

I would be prepared to let you do this if provision could be made to get Mr. Kayne back here for Mr. Mandel's cross examination, but I will not dis-

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2 advantage a man in his cross examination. You know  
3 that as well as I do.

4 MR. SHAW: Mr. Mandel knew at some point  
5 in this week, some point, when Mr. Sloane and Kayne  
6 would be finished testifying, he would be asking  
7 questions on my counterclaims.

8 THE COURT: I didn't get that impression.  
9 I got the contrary impression. Mr. Silfen felt this  
10 should go in without any of this coming at all. We  
11 could have done this this morning. Mr. Silfen raised  
12 objections to this. This is tweedledum and tweedledee.  
13 I could have overruled the objection this morning and  
14 let you do it except for Mr. Silfen's position. I  
15 don't think it has changed. It is a matter of two or  
16 three hours at this point.

17 MR. SHAW: I am afraid --

18 THE COURT: The answer is Mr. Mandel tells  
19 me he is not ready to cross examine on this aspect of  
20 the case. That's what he says.

21 MR. SHAW: He has known since last week that  
22 Mr. Sloane or Mr. Kayne -- and I am not going to call Mr.  
23 Sloane, Mr. Kayne will be called by me --

24 MR. MANDEL: I did not understand until  
25 this luncheon recess that Mr. Shaw was prepared to call



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2 Mr. Kayne on the counter claims to the counterclaims.

3 MR. SHAW: Today as opposed to tomorrow?

4 I don't understand that.

5 MR. MANDEL: If it were done tomorrow I  
6 could prepare tonight on that, but I certainly did not  
7 understand last week, Mr. Shaw, that you proposed to  
8 call Mr. Kayne as a witness on the counterclaims to the  
9 counterclaims.

10 MR. SHAW: That was said. I said that over  
11 and over and over again, that I wanted to examine both  
12 of these individuals with respect to the counterclaims  
13 to counterclaims. I told you the precise areas in which  
14 I wanted to call them. It is foolish to think that what  
15 I would do is let them go back to California and bring  
16 them back. It is to everybody's interest to have these  
17 people return to California as quickly as possible.

18 THE COURT: Mr. Silfen, what do you say to  
19 all of this?

20 MR. SILFEN: I would like to make my po-  
21 sition on this, what my position was and what it con-  
22 tinues to be. I conveyed this to Mr. Shaw.

23 I told Mr. Shaw that to the extent that Mr.  
24 Shaw had any inclination to use Mr. Kayne during the  
25 course of the defense to the claims of Mr. Gross that I

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2 would object; that as far as I was concerned Mr. Kayne's  
3 testimony should come in only with respect to the allega-  
4 tions that were made against him as to Gross. That's  
5 why I have objected that this was outside the scope of  
6 the direct, and what have you. Mr. Shaw alluded to the  
7 fact last week that if that be my position he would have  
8 to keep Mr. Kayne here. Those were his words on the  
9 record to this court. It led me to believe that Mr.  
10 Kayne had two alternatives. Either he could be sub-  
11 poenaed and be compelled to stay, or if Mr. Shaw made a  
12 direction or request to the Court for you to keep Mr.  
13 Kayne here, that Mr. Kayne would either be under subpoena  
14 to be here or might be directed to testify.

15 When Mr. Kayne completed his testimony today  
16 in this Court, I told Mr. Shaw on Friday when he called  
17 me that it was my intention, and Mr. Biehl's intention,  
18 to call Mr. Sloane next, and I would continue to resist  
19 any attempt made by Mr. Shaw to utilize Mr. Kayne out  
20 of the context of our defense.

21 Mr. Shaw agreed with me that he would not  
22 attempt to keep Mr. Kayne on the stand to use him as a  
23 witness in his case.

24 Your Honor now knows Mr. Kayne came off the  
25 witness stand. I objected even as late as this morning



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to any attempt to use Mr. Kayne as part of Mr. Shaw's case. Mr. Sloane went on and has come off. You can see by the baggage in the back that Mr. Kayne and Mr. Sloane had intended to return to California this afternoon. That was the extent of anything that I said to Mr. Shaw about when Mr. Kayne and Mr. Sloane could be used.

They had no intention of voluntarily submitting themselves to testimony, and to the extent that Mr. Shaw told me that as far as he was concerned they could come off and on today since they were here, I obviously was not in a position to resist. They are in the courtroom. There is no specific agreement that they will come back again. In fact, their thoughts were candidly to the contrary. That's the extent of my full disclosure.

MR. SHAW: Do you have any objection to your client getting on the witness stand and testifying with respect to the counterclaim against the counterclaim ?

MR. SILFEN: He is here. Even if I did object you have a way of getting him up here.

THE COURT: When would you be prepared to cross examine?

MR. MANDEL: Tomorrow morning, your Honor.

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2 THE COURT: Put him on now and cross ex-  
3 amination will start at 10 o'clock in the morning.

4 MR. SILFEN: That won't work unless he is  
5 under subpoena of this Court. His daughter is ill. He  
6 has been out for three weeks.

7 MR. SHAW: I will not call this man. I  
8 will be decent.

9 At this time I would like to read some  
10 deposition in evidence. I have a witness coming at  
11 three o'clock.

12 Robert L. Stern, Sanford Roggenburg, Harold  
13 J. Richards, Richard D. Stern.

14 MR. GRUTMAN: While we are doing that --

15 MR. MANDEL: I don't see how we can read  
16 in the depositions of defendants against us.

17 MR. SHAW: Let's do it party by party.  
18 There was a different reason for each party, rather  
19 than doing it en masse. I think it will be much more  
20 orderly.

21 The first one is Robert L. Stern, and he  
22 resides outside of 100 miles from this Courthouse.

23 MR. MANDEL: It makes no difference. The  
24 deposition of an adverse party may not be used against  
25 my clients. He is not a witness. He is a party. He



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2 is an adverse party.

3 MR. SHAW: Insofar as I am concerned, he is  
4 not my party or client. He is a partner. Robert L.  
5 Stern is outside of the jurisdiction. He cannot be  
6 reached by subpoena. I have no control over him. Mr.  
7 Moss does not indicate he is going to be called. I  
8 need this person's testimony for my case insofar as the  
9 corporation is concerned. His deposition was taken on  
10 notice. I believe, although I am not positive about  
11 this, that a portion of his deposition may have been  
12 read in evidence.

13 MR. MANDEL: I don't think so.

14 MR. SHAW: I would like to read certain por-  
15 tions of Mr. Stern's deposition.

16 THE COURT: Mr. Mandel, what is the basis  
17 of your objection?

18 MR. MANDEL: The deposition of a party may  
19 only be used by the other side.

20 THE COURT: Let's keep in mind now he may  
21 well be for this purpose a witness. Rule 32-A-3 speaks  
22 of a deposition of a witness whether or not a party. It  
23 may be used for any person if certain basic criteria are  
24 met.

25 MR. MANDEL: His deposition was taken as that

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2 of a party only and not as a witness, and in taking the  
3 deposition --

4 MR. SHAW: This is Mr. Mandel's deposition.

5 MR. MANDEL: Yes. It is a deposition I took  
6 in discovery of an adverse party. I don't believe that  
7 the rules countenance having statements made that way  
8 brought in and not being subject to cross examination  
9 on my part here just because the man is in Washington,  
10 D.C. rather than in Manhattan.

11 THE COURT: Do you acknowledge that sub-  
12 section 3 speaks of the deposition of a witness, whether  
13 or not a party?

14 MR. MANDEL: Yes.

15 THE COURT: That means that even though he  
16 may be a party he may also be treated as a witness, if  
17 you meet the other criteria.

18 MR. MANDEL: I am not sure of that. I  
19 frankly acknowledge I have not researched this question.  
20 Outside of looking at the bare bones of the  
21 rule here, I have nothing but instinct to guide me. I  
22 think before we take such deposition testimony we ought  
23 to at least have a look at Moore's Federal Practice or  
24 something of that nature. I think that is inherently  
25 prejudicial to allow a party who is able to come here to



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testify by deposition to testify by deposition and avoid cross examination. I think it is unfair to allow any other party on his side to use a deposition that way.

Your Honor knows in discovery we look for all kinds of material which we might be careful of if we knew we could never cross examine.

THE COURT: Is there any question but what this first witness is more than 100 miles?

MR. SHAW: Mr. Mandel has himself said that he is in Washington, D.C.

THE COURT: I am going to permit it. If overnight you have some basis for asking me to strike it--

MR. MANDEL: One further caveat. Is this now part of the counterclaim to the counterclaim evidence or part of the defense, because the defense would rest before we get into the counterclaim to the counterclaim.

MR. SHAW: My impression, with respect to all of the depositions is that it relates to not only the defense, but in some respects to the counterclaims to the counterclaims. If Mr. Mandel would like me to preface the reading of certain portions, that it relates to one category or the other, I think it would be unnecessary, but I would be glad to do so. I don't think we need it. The depositions fall in both areas.

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MR. MANDEL: I believe that the proper way to handle this is for the defense to be concluded with its material --

THE COURT: We are non-jury here.

MR. SHAW: If we do it as Mr. Mandel suggests, it is the first time --

THE COURT: It is complicated to do it that way.

MR. MANDEL: I am afraid we will be creating confusion otherwise.

THE COURT: I trust not, and if it is created, I am sure you will help to dispel it.

MR. MANDEL: I personally do not know as to where Robert Stern lives except what I have heard. I think we should at least have a representation on the record that he lives in Washington.

MR. SHAW: Mr. Moss has told me that Mr. Abrams of his firm has dealt with Mr. Robert L. Stern, but Mr. Moss knows that he has written to him in Washington.

Do you so represent?

MR. MOSS: I never spoke to him personally.

MR. SHAW: But you know the correspondence was addressed to Washington, D.C.?



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2 MR. MOSS: Yes, so I believe. I never  
3 dealt with him.

4 THE COURT: Accepting these things as I  
5 do, Mr. Moss, would you, between now and tomorrow,  
6 verify that fact so that the record is clear?

7 I will go ahead on that basis, and if the  
8 evidence is to be stricken, it will be stricken.

9 MR. MANDEL: I think this may be the only  
10 deposition where the party lives outside --

11 MR. SHAW: We also have Richard Stern who  
12 lives in Cincinnati.

13 Leo Stern is, of course, dead.

14 Sanford Roggenburg --

15 MR. GRUTMAN: He is alive. Adolphus is dead.

16 MR. SHAW: In the meantime, the witness  
17 who was supposed to arrive at three o'clock has come  
18 into the courtroom and despite all this talk that we  
19 have had I wonder if we could save time by coming to  
20 the depositions after the witness is completed.

21 THE COURT: Mr. Moss, maybe you could make  
22 a phone call during the afternoon recess.

23 E D M U N D M. R U B I N, called on behalf of New-  
24 burger, Loeb & Company, having been duly sworn,  
25 testified as follows:

